Supreme Court, U.S.
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No. 00 612

In The
Supreme Court of the United States

VOLUNTEERS OF AMERICA OKLAHOMA, INC.,
Petitioner,

v.

DEBORAH JOHNSTON, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the companionship services exemption, 29 U.S.C. § 213(a)(15), to the overtime wage requirements of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.*, mandates that a family member of an elderly or disabled individual must reside in that individual's home in order for the home to be a "private home" so as to exempt providers of companionship services from paying overtime wages?

PARTIES TO THE PROCEEDING

The Petitioner is Volunteers of America Oklahoma, Inc., a privately-held, not-for-profit Oklahoma corporation which has not issued any shares to the public and has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

The Respondents are individuals, Deborah Johnston and Diana Russ, individually and on behalf of others similarly situated, to wit:

Bridget A. Ames;
Russell Applegate (dec.) - Norman L. Applegate;
Lajoya A. Barnes;
Sharon Bates;
Betty J. Baucom;
Helen Berry;
Pamela J. Berry;
Jimmy Bostic;
Aleta Britt;
Angeline C. Brooks;
Shawnda L. Brown;
Dawna Campbell;
Jonathan Coleman
Edna J. Crabtree;
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Sandra D. Deville;
Tracy Emerson;
Tina M. English;
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Linda Hall;
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Kimberly Jones;
Rosie M. Jones;
Kelly J. Kaulay;
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Yolanda Ramsey;
Tracy Richard;
Tilequa L. Savage;
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Patricia L. Staley;
Teri Vaught;
Teresa Veales;
Ernest Walston;

Jerild A. Walston;
Karla Walston;
Rhonda D. Wheeler;
Sandra Wilkins.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES viii

CITATION TO OFFICIAL JUDICIAL OPINION xi

STATEMENT OF BASIS
FOR JURISDICTION xi

STATUTORY AND REGULATORY
PROVISIONS INVOLVED xi

STATEMENT OF THE CASE 1

The Fair Labor Standards Act 5
This Litigation 8
The Tenth Circuit Opinion Below 8

ARGUMENT FOR GRANTING THE WRIT 9

PROPOSITION I
THE TENTH CIRCUIT OPINION BELOW CREATES AN INTOLERABLE CONFLICT WITH ANOTHER CIRCUIT COURT OF APPEALS OPINION, AN OPINION BY A STATE COURT OF LAST RESORT, AND OTHER LOWER COURT OPINIONS. 9

PROPOSITION II
THIS APPEAL RAISES A COMPELLING QUESTION OF FIRST IMPRESSION UNDER THE FAIR LABOR STANDARDS ACT WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT 13

PROPOSITION III
THIS APPEAL RAISES COMPELLING PUBLIC POLICY ISSUES REQUIRING RESOLUTION BY THIS COURT. 18

PROPOSITION IV
THE TENTH CIRCUIT'S OPINION SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND APPELLATE REVIEW SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER. 20

A. VOAO Does Not Typically Select a Residence for the Clients and Does Not Typically Set up Shared Living Arrangements. 22

B. Although There Are Some Instances Where Multiple Clients Reside in the Same Home, Such Is Not Necessarily the Typical Case. 23

C. VOAO Does Not Typically Sign the Lease and Pay the Rent. 23

D. VOAO Employees Do Not Typically Manage the Residences and VOAO Does Not Exercise Control over Clients' Daily Activities. 23

E. VOAO Does Not Control Access to the Residences. 26

F. If VOAO's Services Are Terminated, the Client, Not VOAO, Remains in the Residence. 27

G. VOAO's Employees Do Not "Occupy" a Room of the Residence to Serve as an Office Which Houses Desks and File Cabinets. 27

CONCLUSION 29

APPENDIX

Appendix A
Tenth Circuit Opinion, 5/23/00 . . . . . 1a

Appendix B
District Court Judgment, 6/4/99 . . . . . 17a

Appendix C
District Court Order, 4/9/99 . . . . . 22a

Appendix D
Tenth Circuit Order Denying Petition for Rehearing and Request for En Banc Review, 7/18/00 . . . . . 33a

Appendix E
29 U.S.C. § 213(a)(15) 35a

29 C.F.R.§ 552.3 . . . . . 35a

29 C.F.R. § 552.6 . . . . . 36a

TABLE OF AUTHORITIES

Cases

American Federation of Musicians v. Wittstein,
379 U.S. 171, 85 S.Ct. 300,
13 L.Ed.2d 214 (1964) 13

Armani v. Maxim Healthcare Servs., Inc.,
53 F. Supp. 2d 1120 (D. Colo. 1999) 12

Bennett v. Coors Brewing Co.,
189 F.3d 1221 (10th Cir. 1999) 28

Bowler v. Desert Village Assoc., Inc.,
922 P.2d 8 (Utah 1996) 9, 10, 11, 12

City of Cleburne, Texas v. Cleburne Living Center,
473 U.S. 432, 105 S.Ct. 3249,
87 L.Ed.2d 313 (1985) 16

Gay v. Extended Family Concepts,
102 F. Supp. 2d 449 (N.D. Ohio 2000) 12

Homeward Bound, Inc. v. Hissom Memorial Center,
No. 85-C-437-E, 1987 WL 27104
(N.D. Okla. 1987) 2

Johnston v. Volunteers of America, Inc.
213 F.3d 559 (10th Cir. 2000) . . . . . *passim*

Layne & Bowler Corp. v. Western Well Works,
261 U.S. 387, 43 S.Ct. 422,
67 L.Ed. 712 (1923) 18

Linn v. Developmental Servs. of Tulsa, Inc.,
891 F. Supp. 574 (N.D. Okla. 1995) 12

Lott v. Rigby,
746 F. Supp. 1084 (N.D. Ga. 1990) 12, 15

Madison v. Resources for Human Development, Inc.,
39 F. Supp. 2d 542 (E.D. Pa. 1999) 12

McCune v. Oregon Sr. Servs. Div.,
894 F.2d 1107 (9th Cir. 1990) . . . 9, 10, 12, 14, 15

McCune v. Oregon Sr. Servs. Div.,
649 F. Supp. 1444 (D. Or. 1986) 10

Patterson v. Lamb,
329 U.S. 539, 67 S.Ct. 448,
91 L.Ed. 485 (1947) 18

Rice v. Sioux City Cemetery, 349 U.S. 70, 75 S.Ct. 614,
99 L.Ed. 897 (1955) 13

Romer v. Evans,
517 U.S. 620, 116 S.Ct. 1620,
134 L.Ed.2d 855 (1995) 17

Sweatt v. Painter,
339 U.S. 629, 70 S.Ct. 848,
94 L.Ed. 1114 (1950) 17

Terwilliger v. Home of Hope, Inc.,
21 F. Supp. 2d 1294 (N.D. Okla. 1998) 12

Thompson v. City of Louisville,
362 U.S. 199, 80 S.Ct. 624,
4 L.Ed.2d 654 (1960) 20

Statutes

28 U.S.C. § 1254(1) xi
28 U.S.C. § 1291 xi
28 U.S.C. § 1331 xi
29 U.S.C. § 201 . . . . . i, 1
29 U.S.C. § 213(a)(15) . . . . . *passim*
29 U.S.C. § 207(a)(1) 5
29 C.F.R. § 552.3 . . . . . xi, 7, 9
29 C.F.R. § 552.6 . . . . . xi, 7
29 C.F.R. § 552.101(a) 14
29 C.F.R. § 552.109 8
42 U.S.C. § 6009 16
Supreme Court Rule 10(a) and 10(c) xi

CITATION TO OFFICIAL JUDICIAL OPINION

The opinion of the Court of Appeals is reported as *Johnston, et al. v. Volunteers of America, Inc.*, 213 F.3d 559, (10th Cir. 2000), and is reproduced in the Appendix beginning at page 1a.

STATEMENT OF BASIS FOR JURISDICTION

On May 23, 2000, the United States Court of Appeals for the Tenth Circuit entered its order affirming judgment in favor of Respondents. On July 18, 2000, the Court of Appeals denied VOAO's Petition for Rehearing and Request for Rehearing En Banc. Review is sought pursuant to 28 U.S.C. § 1254(1), and pursuant to Supreme Court Rule 10(a) and 10(c). The district court's jurisdiction was premised upon 28 U.S.C. § 1331 and the jurisdiction of the Court of Appeals was based upon 28 U.S.C. § 1291.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This litigation involves the interpretation and scope of the companionship services exemption to the Fair Labor Standards Act, located at 29 U.S.C. § 213(a)(15), and the Department of Labor's regulatory interpretation of the exemption as set forth in 29 C.F.R. §§ 552.3 and 552.6. These statutory and regulatory provisions are set forth in relevant part below, as well as in their entirety in the Appendix beginning at page 35a.

STATEMENT OF THE CASE

This case involves claims for overtime wages pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq* ("FLSA"). Volunteers of America Oklahoma, Inc. ("VOAO") is a non-profit corporation which provides various social services to the public, including assisted living or "habilitative" services to individuals with developmental disabilities, housing for the elderly, before and after school day-care programs, and a retired senior volunteers program. This appeal involves VOAO's assisted living services provided to individuals who are unable to care for themselves by reason of mental or physical infirmity. The assisted living services provided by VOAO are governed by a series of contracts with the Oklahoma State Department of Human Services. These contracts require that individuals receive those services in a home owned or leased by the individual. VOAO enters into such contracts with the State every year.

The vast majority of VOAO's clients[1] in its assisted living program are former residents of the Hissom Memorial Center, an institution for physically and mentally disabled individuals formerly located in Tulsa, Oklahoma. In *Homeward Bound, Inc. v. Hissom Memorial Center,* No. 85-C-437-E, 1987 WL 27104 (N.D. Okla. 1987), the district court, holding that the institution's residents had been denied adequate food, clothing, medical care, and shelter, entered an Order of Deinstitutionalization effectively integrating Hissom residents into the community. The purpose of VOAO's supported living program is to provide supervision, habilitation, protection and assistance with the activities of daily living to the former Hissom residents as well as other infirm individuals, and to provide those services to the clients in their own homes. VOAO's goal is to get its clients to function as normally and independently as possible in the community.

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[1] VOAO's clients have a wide range of disability levels. For example, former VOAO client John Chappell functioned at a very high level. VOAO employees provided Mr. Chappell transportation to visit his friends, girlfriends, and family. They also provided Mr. Chappell assistance with grocery shopping, other personal shopping, and money management. At the other end of the spectrum, former VOAO client James Adamson functioned at the mental level of a one-and-a-half-year old. His parents and local co-guardian made decisions about virtually everything on his behalf, although at times they instructed VOAO's employees to purchase clothes and other items for Mr. Adamson. Although Mr. Adamson is nonverbal, his VOAO workers tried to tailor his activities and food choices to include the things Mr. Adamson indicated he likes. Mr. Adamson's parents and guardian eventually became dissatisfied with VOAO and hired a new service provider for him.

VOAO's employees in the supported living program provide assistance to clients in learning general life skills and basic living techniques. This assistance, also known as "incidental teaching", is individually detailed to each client to empower the client to learn to be as independent and self-supportive as possible. As part of the clients' programs, VOAO's employees assist and encourage clients to develop general life skills, including the ability to perform general household work. One of the goals is to involve the clients, to the fullest extent possible, in every activity which takes place in the client's home, including landscaping, watering plants, raking leaves, buying groceries, cleaning windows, mopping, vacuuming, laundry, and clothes shopping. Generally VOAO's employees are trained to assist the clients with their day-to-day activities and the maintenance of their own homes to live as independently as possible.

All of the homes where VOAO's clients live are either owned or leased by the clients. These homes are located in regular neighborhoods throughout the state. They are not segregated, isolated or distinguished in any way from the normal residential housing communities in which the general public resides. In the case of leased homes, the client's name appears on the lease. VOAO is sometimes listed along with the client on the lease if the physical and mental ability of the client is such that the client cannot read or comprehend the lease, or if the client's guardian refuses to sign the lease.

Although VOAO employees may look for a home for a client to rent, such would only be done at the request of the client or his parent or guardian. Further, the client or his parents or guardians select furniture for the clients' homes if they want to, although they frequently delegate that task to VOAO.

VOAO does not designate which clients will live together. There are one, two, or three clients residing in the homes where VOAO provides assisted living services. The client or the client's family or guardian determines whether the client wants a roommate, and if so, who that roommate will be. Some clients elect to have a roommate; others choose to live alone.

VOAO does not maintain a set of keys to its clients' homes. If the client or his parent or guardian wants the staff to have a key, that is their choice. Some of VOAO's clients are physically unable to use or manage keys, and VOAO's staff therefore must use the keys to open the door for the client.

The clients pay their rent, utilities and food with a combination of their own personal funds and state funds. Clients have various sources of personal funds, including their social security checks, income from their jobs, and even trust money on occasion. It is not uncommon for VOAO to write the rent check for its clients. When VOAO does so, it writes the check from VOAO's operating account and then takes money from that client's account to repay the operating account. Some clients are capable of handling their own finances, while others need assistance from VOAO. VOAO clients who can handle their own money do so, but VOAO workers provide help to clients who want or need help in that area. When VOAO holds money for those clients who request VOAO to do so, that money is kept in separate trust accounts.

The client or his parent or guardian can change providers from VOAO to another agency at any time. In the event of a change in providers, the client stays in his or her home. For example, when the guardian for VOAO clients

Annie White and Glenda Wheat decided to terminate VOAO's services, Ms. White and Ms. Wheat stayed in their home and VOAO left. John Chappell, a former VOAO client, hired and fired staff of VOAO on a regular basis. He also ultimately fired VOAO. When Mr. Chappell fired VOAO, his leased property stayed with him, not with VOAO.

Each of VOAO's clients' homes is different. Each is a home environment, not open to the general public. These homes are neither institutions nor established to operate as an institutionalized setting. There are no state or federal licensing requirements for the clients' homes in which VOAO provides the assisted living services.

The Fair Labor Standards Act

Based on the companionship services exemption to the FLSA, VOAO employees working in the supported living program were paid straight time rather than time-and-a-half for hours worked over forty per week, from July of 1994 forward. Other service providers, similar to VOAO, offering companionship services to the elderly and persons with developmental disabilities also pay straight time for hours worked over forty per week.

The payment of overtime wages is governed by the FLSA. Hourly workers must be compensated at a rate of one and one-half times their regular hourly wage for all hours worked in excess of forty hours per week. *See* 29 U.S.C. §

207(a)(1).[2] There are, however, numerous exemptions to this general overtime wage requirement.

Among these exemptions is the companionship services exemption found at 29 U.S.C. § 213(a)(15). Under the companionship services exemption, employees who provide companionship services in a private home for those who are unable to care for themselves because of age or mental or physical infirmity are exempt from the overtime wage requirements of the FLSA. Specifically, § 213(a)(15) states that the overtime wage requirements do not apply with respect to:

> . . . any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary);

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[2] That section provides:

> [e]xcept as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 213(a)(15), Appendix at p. 35a.

The statutory exemption contains two principal requirements which must be met. First, the employee must be employed in "domestic service"; and, second, the employee must provide "companionship services". The United States Department of Labor regulations governing the administration of the companionship services exemption are found at 29 C.F.R. Part 552. These regulations define both "domestic service" and "companionship services". According to 29 C.F.R. § 552.3, the term "domestic service employment" refers to:

> services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. . . .

Id. Appendix at pp.35a-36a. The term "companionship services" is defined in 29 C.F.R. § 552.6 as:

> those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. . . .

Id. Appendix at p. 36a. That the person receiving companionship services chooses to hire an agency to provide these services as opposed to hiring a single individual does not defeat the use of the companionship services exemption. 29 C.F.R. § 552.109.

This Litigation

VOAO employees Deborah Johnston and Diana Russ, individually and on behalf of all others similarly situated, ("Plaintiffs") sued VOAO seeking unpaid overtime wages under the FLSA. VOAO sought summary judgment because the services provided by the Plaintiffs fit squarely within the companionship services exemption to the overtime wage requirements of the FLSA. The district court denied VOAO's motion for summary judgment and granted summary judgment to the Plaintiffs, ruling that the residences in which the Plaintiffs provided these services were more closely analogous to state-maintained facilities than to private homes, and Plaintiffs were therefore entitled to receive overtime wages. *See* Appendix at pp. 22a-32a. The district court entered judgment for Plaintiffs. Appendix at pp. 17a-21a. On appeal, the Tenth Circuit affirmed the district court, Appendix at pp. 1a-16a, and denied VOAO's request for rehearing. *See* Appendix at pp. 33a-34a.

The Tenth Circuit Opinion Below

The Tenth Circuit Court of Appeals ruled that the services provided by VOAO's employees are not provided in "private homes" and therefore do not fit within the companionship services exemption to the overtime wage requirements of the FLSA. *Johnston*, 213 F.3d at 565, Appendix at p. 13a-14a. The Tenth Circuit observed that VOAO's disabled clients "are placed in a residence outside

the family home and without the full-time, live in care of a relative. . . . Their diets and daily activities are controlled by a Habilitation employee--not a family member." *Johnston*, 213 F.3d at 565, Appendix at p. 13a. The Tenth Circuit reasoned, "[t]hese residences, managed by VAO employees, do not fit plainly and mistakenly into the ordinary connotation of the words 'private home' as used in 29 C.F.R. § 552.3, notwithstanding the fact that the lease may bear the name of a developmentally disabled person." *Johnston*, 213 F.3d at 565, Appendix at p. 14a. Therefore, the Tenth Circuit ruled that the companionship services performed "for individuals who (because of age or infirmity) are unable to care for themselves" qualify for the overtime wages exemption **only if the infirm individual resides with a relative**.

ARGUMENT FOR GRANTING THE WRIT

PROPOSITION I: THE TENTH CIRCUIT OPINION BELOW CREATES AN INTOLERABLE CONFLICT WITH ANOTHER CIRCUIT COURT OF APPEALS OPINION, AN OPINION BY A STATE COURT OF LAST RESORT, AND OTHER LOWER COURT OPINIONS.

Explicit in the Tenth Circuit's ruling is that a "private home" can only be a home in which a family member of the infirm person resides. However, the opinion by the Ninth Circuit Court of Appeals in *McCune v. Oregon Sr. Servs. Div.*, 894 F.2d 1107 (9th Cir. 1990), and the opinion by the Utah Supreme Court in *Bowler v. Desert Village Assoc., Inc.*, 922 P.2d 8 (Utah 1996), have no such "home of a family member" requirement. *Certiorari* is appropriate because the

Tenth Circuit opinion below creates an intolerable conflict which can only be resolved by this Court.

In *McCune*, the State of Oregon provided in-home service care to qualified elderly, blind and disabled clients. Similar to VOAO's clients, these clients were recipients of public assistance funding provided by state agencies. The plaintiffs, employed as live-in attendants for these elderly and disabled persons, filed suit to obtain compensation for overtime wages. The defendant agency contended that the employees were not entitled to overtime pay based on the companionship services exemption. The district court found that the services provided by the plaintiffs fell within the companionship services exemption and granted the defendant's motion for summary judgment. *See McCune v. Oregon Sr. Servs. Div.*, 643 F. Supp. 1444 (D. Or. 1986). On appeal, the Ninth Circuit found that the companionship services exemption had been properly applied, and affirmed the grant of summary judgment without imposing a "home of a family member" requirement.

In *Bowler*, the Utah Supreme Court ruled that a residential and vocational "development habitation" facility, in which fourteen mentally and physically handicapped adults lived, was a "private home" for purposes of the companionship services exemption. In reaching this conclusion, the Utah Supreme Court analyzed the meaning of "private home" within the context of the FLSA, noting:

> Neither the FLSA, its regulations, nor its legislative history defines the exact meaning of "private home." Therefore, we must "closely examine the living arrangement to determine whether the residences where the Plaintiff works should be characterized as 'private

> homes.'" *Linn v. Developmental Servs. of Tulsa, Inc.*, 891 F. Supp. 574, 579 (N.D. Okla. 1995). The regulations state that the definition of "private home" comes from "the generally accepted meaning" of the term and that a "private home" could include a "separate and distinct dwelling maintained by an individual or a family in an apartment house, condominium or hotel." 29 C.F.R. § 552.101(a). The regulations, however, exclude from the definition "dwelling places which are primarily rooming or boarding houses" where such are "commercial or business establishments." *Id.* § 552.101(b). . . .
>
> . . . The statute and its regulations, however, indicate that the definition of a "private home" exists along a continuum. A traditional family home in which a single family resides would clearly be a "private home," but a "private home" would not include an "institution primarily engaged in the care of the sick, the aged, the mentally ill" or a boarding house used for business or commercial purposes. However, various living situations fall in between these extremes which may or may not be "private homes" for the purposes of 29 U.S.C. § 213(a)(15).

Bowler, 922 P.2d at 13 (footnotes omitted). Consequently, to determine if a particular living arrangement is a "private home" for purposes of the companionship services exemption, the Utah Supreme Court developed four factors to consider: "(1) its source of funding; (2) access to the facility by the

general public; (3) whether it is organized for profit or is a nonprofit organization; and (4) the size of the organization." *Id.* at 13-14 (footnotes omitted). Considering these factors, the Utah Supreme Court ruled that the "development habitation" housing the fourteen individuals was a "private home" for purposes of the companionship services exemption. The Court did not impose a "home of a family member" requirement for the exemption to apply.

McCune and *Bowler*, unlike *Johnston*, do not require that the companionship services be provided to a disabled individual solely within the confines of a home of a family member. Other opinions by lower courts are in accord with *McCune* and *Bowler*. *See Gay v. Extended Family Concepts,* 102 F. Supp. 2d 449 (N.D. Ohio 2000) (no "home of a family member" requirement); *Armani v. Maxim Healthcare Servs., Inc.*, 53 F. Supp. 2d 1120 (D. Colo. 1999) (same); *Madison v. Resources for Human Development, Inc.*, 39 F. Supp. 2d 542 (E.D. Pa. 1999) (same); *Terwilliger v. Home of Hope, Inc.*, 21 F. Supp. 2d 1294 (N.D. Okla. 1998) (services provided by habilitation training specialists in a supported living program nearly identical to VOAO's program were provided in "private residences" for purposes of the companionship services exemption even though clients did not live with a family member); *Linn v. Developmental Servs. of Tulsa, Inc.*, 891 F. Supp. 574 (N.D. Okla. 1995) (no "home of a family member" requirement); *Lott v. Rigby*, 746 F. Supp. 1084 (N.D. Ga. 1990) (same).

An intolerable conflict exists between the Tenth Circuit opinion below and the opinions by the Ninth Circuit and the Utah Supreme Court, as well as other lower court opinions. Only this Court can effectively resolve this conflict.

PROPOSITION II: THIS APPEAL RAISES A COMPELLING QUESTION OF FIRST IMPRESSION UNDER THE FAIR LABOR STANDARDS ACT WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

Certiorari is appropriate because this appeal raises a question which is "an important one of first impression" under the FLSA. *See American Federation of Musicians v. Wittstein*, 379 U.S. 171, 175, 85 S.Ct. 300, 13 L.Ed.2d 214 (1964). The question presented in this appeal is truly "beyond the academic or the episodic." *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955). This litigation presents an intrinsically important question of federal law involving exemptions to the FLSA–the rights of individuals who are infirm due to age or mental or physical disability to receive the highest possible quality of treatment, service and habilitation in the least restrictive environment.

This Court's ruling on this important question of first impression will potentially impact millions of Americans who require or will require companionship services. To date, there is no guidance by this Court concerning the interpretation of the FLSA's companionship services exemption. Likewise, no interpretation or clarification exists as to what constitutes a "private home" as contemplated under that exemption.

The Tenth Circuit interposed a home of a family member requirement which cannot be gleaned from the statute or regulations. No other court has imposed a similar requirement. The Tenth Circuit's interpretation has no

statutory or regulatory basis. *See, e.g.*, 29 C.F.R. § 552.101(a) (providing that a "private home" could include separate and distinct dwelling maintained by an individual **or** family). It is an unduly narrow and overly restrictive interpretation of the exemption which will severely limit the services offered by publicly-funded providers like VOAO. The Tenth Circuit's interpretation will make these critical services unaffordable to the increasing number of Americans seeking home-based companionship services.

The Tenth Circuit's ruling makes companionship services unaffordable. The Oklahoma Department of Human Services contracts with approximately thirty-five (35) private service providers, including VOAO, to provide companionship services to clients in private homes. Eligible clients are provided these services *contingent upon the availability of state funding*. The ability of all such service contract providers, including VOAO, to provide companionship services will be substantially, if not drastically, affected by the Tenth Circuit's ruling, to the detriment of the physically and mentally infirm. Other states have similar arrangements for the provision of companionship services. The Tenth Circuit's ruling will therefore have a far-reaching effect on those providers' ability to render companionship services.

In analyzing this issue, the Tenth Circuit ruled that the policy issues and concerns contemplated in *McCune v. Oregon Senior Servs. Div.*, 894 F.2d 1107 (9th Cir. 1990), have "no application to this matter" supposedly because VOAO employees "do not live with their clients or provide around-the-clock care." *Johnston*, 213 F.3d at 565, Appendix at p. 12a-13a. This determination is not supported by the record in light of the fact that VOAO submitted testimony by VOAO employees that they were on call twenty-four (24)

hours a day, as well as VOAO employee notes recording around-the-clock care for clients. In *McCune*, the Ninth Circuit observed the critical public policy concerns at issue:

> [W]e note that there are also sound policy reasons for applying the exemptions to companions as defined by the Secretary. We are informed that these critical services reach more elderly and infirm individuals than they otherwise would precisely because the care providers are exempt from the FLSA. We also note that many private individuals, who do not benefit from federal and state assistance, may also be forced to forgo the option of receiving these services in their homes if the cost of the services increases. The only alternative for these individuals may be institutionalization.

McCune, 894 F.2d at 1110. The public policy concerns expressed in *McCune* apply equally here.

The Tenth Circuit's ruling gives insufficient weight to the compelling public policy concerns behind Congress' creation of the companionship services exemption. *See Lott v. Rigby*, 746 F. Supp. 1084, 1087 (N.D. Ga. 1990) (Congress created the exemption to enable the disabled to afford care in private homes as opposed to institutions). If companionship services are not affordable, then aged and mentally or physically infirm individuals will face institutionalization.

Congress has mandated that all developmentally disabled Americans have the right to the highest quality of treatment in the least restrictive environment:

> Congress makes the following findings respecting the rights of individuals with developmental disabilities:
>
> (1) Individuals with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.
>
> (2) The treatment, services, and habilitation for an individual with developmental disabilities should be designed to maximize the developmental potential of the individual and should be provided in the setting that is least restrictive of the individual's personal liberty.
>
> * * *
>
> The rights of individuals with developmental disabilities described in findings made in this section are in addition to any constitutional or other rights otherwise afforded to all individuals.

42 U.S.C. § 6009 (emphasis added). *See also City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 443, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) ("Thus, the Federal Government has ... also provided the retarded with the right to receive 'appropriate treatment, services, and habilitation' in a setting that is 'least restrictive of [their] personal liberty.'") (alteration in original).

The Tenth Circuit's ruling creates an unsupported restriction upon the quality of treatment and care provided to the mentally and physically infirm. There is no sound basis

for denying certain individuals equal access to the highest quality of treatment merely because no family member lives with them. Such a conclusion is illogical. It conflicts with federal law and violates the equal rights of developmentally disabled individuals to treatment, services and habilitation of the highest quality and in the least restrictive environment--their own home. It creates a suspect classification of certain developmentally disabled individuals whose access to treatment, services and habilitation is restricted based solely upon whether they live with a family member. It significantly impairs developmentally disabled individuals' fundamental rights to equal protection under the law. *Romer v. Evans*, 517 U.S. 620, 633, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1995) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."). "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Id.* (*quoting Sweatt v. Painter*, 339 U.S. 629, 635, 70 S.Ct. 848, 94 L.Ed. 1114 (1950)).

By ruling VOAO's services are not performed in a "private home," notwithstanding both evidence to the contrary and the common interpretation of the term, the Tenth Circuit has effectively held that certain aged and infirm individuals are incapable of experiencing the lifestyle Congress sought to create and to which all Americans are entitled. It should be self evident that an aged or infirm individual will typically not be able to "maintain" his own home in the same sense that non-disabled individuals "maintain" their homes. Service providers like VOAO are hired in such situations to do what the disabled person cannot do for himself and to assist and train the client to be as independent as possible. The fact that no family member lives in the residence with the disabled individual should be

immaterial to that disabled person's home being considered a "private home."

Certiorari is appropriate to address this compelling issue of first impression under federal law.

PROPOSITION III: THIS APPEAL RAISES COMPELLING PUBLIC POLICY ISSUES REQUIRING RESOLUTION BY THIS COURT.

Certiorari is also appropriate because this appeal raises questions important "to the public as distinguished from" a question of importance merely to the parties. *See Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393, 43 S.Ct. 422, 67 L.Ed. 712 (1923). As this Court recognizes, a writ of *certiorari* is appropriate where many individuals are involved or are affected by the decision below. *See Patterson v. Lamb*, 329 U.S. 539, 67 S.Ct. 448, 91 L.Ed. 485 (1947).

This Court's ruling will potentially impact millions of Americans, including the aging generation of "baby boomers" as well as those who are unable to care for themselves due to mental or physical infirmity. As the number of individuals unable to care for themselves increases, an ever-growing number of persons will be directly and individually impacted by this Court's review. If the Tenth Circuit's ruling stands, individuals who are unable to care for themselves due to age

or infirmity will not be able to afford companionship services unless they live with a relative.[3]

The Tenth Circuit's analysis of the public policy issues in this case is short-sighted and overly restrictive of Congress' intent behind the companionship services exemption. The Tenth Circuit placed undue emphasis in its analysis of whether the companionship services were provided in "private homes" on whether the disabled recipient lives with a family member. Under the Tenth Circuit's interpretation, a disabled person who does not live with a family member can **never** be said to live in a "private home." Such an interpretation creates an undue burden upon those needing companionship services. Likewise, there is no legislative, regulatory or public policy support for such a restrictive application of the companionship services exemption. Using the criteria of requiring the "live-in care of a family member" to determine whether or not a home is a "truly private home", as the Tenth Circuit describes it, creates an unrealistic and unfairly discriminatory dichotomy.

Not all disabled individuals are fortunate enough to have family members who are able to live with them. Not all elderly or disabled individuals can afford to live independently, without roommates to share expenses. Neither the absence of a "live-in" family member nor the presence of a roommate should prevent an elderly or disabled person from

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[3] There could be no argument that the companionship services exemption should apply if the client actually owned, rather than rented, the home. Under the Tenth Circuit's analysis, however, a home owned by an infirm individual cannot be a "private home" unless a family member lives with that infirm individual.

establishing her own "private home." These critical services reach more elderly and infirm individuals than they otherwise would precisely because the care givers are exempt from the overtime wage requirements of the FLSA. Many individuals will be forced to reduce the amount of services they receive or forego receiving services if the cost increases due to the inapplicability of the companionship services exemption.

What is truly at stake in this litigation? It is the right and ability of literally millions of disabled and aging Americans to afford necessary companionship services to assure an independent, dignified existence. Resolution of the question presented to this Court will impact the rights of all persons who are unable or who will become unable to care for themselves, due to age or mental or physical infirmity, to receive affordable companionship services. The nature and scope of the individuals directly affected by the Tenth Circuit's ruling and the underlying public policy issues presented by this case warrants *certiorari*.

PROPOSITION IV: THE TENTH CIRCUIT'S OPINION SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND APPELLATE REVIEW SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

Certiorari is appropriate because the Tenth Circuit's evidentiary conclusions are so off the mark that the opinion has significantly departed from the accepted and usual course of judicial proceedings and appellate review, so as to call for an exercise of this Court's supervisory power. *See Thompson v. City of Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d

654 (1960). As outlined below, the Tenth Circuit's evidentiary conclusions were unsupported by the record or were supported by "facts" which were disputed by competent, admissible evidence. The errors by the Tenth Circuit are so substantial as to warrant this Court's exercise of its extraordinary supervisory authority. The Tenth Circuit even incorrectly identified VOAO in the caption as "Volunteers of America, Inc." Appendix at p. 2a. A seemingly innocent error; but it is only the beginning of the errors made by the Tenth Circuit.

The Tenth Circuit summarized as follows the "facts" upon which it relied to conclude that the subject homes were not "private homes":

> In the supported living program, the client does not reside with a family member. The VAO typically selects a residence for the developmentally disabled person, and sets up shared living arrangements with other developmentally disabled persons. Up to three clients reside in the residences in the VAO supported living program. The VAO signs the lease, and typically pays the rent from the client's trust accounts. In the supported living program, only the clients of the VAO may live together. The VAO usually selects the clients who will share the same residence, although the client has the right to request a change of roommate. If one of the clients terminates the VAO's services and chooses a different service provider than his roommate, one of them must leave the residence.

> The Habilitation employees manage the residences in the supported living program. They buy the food, control access to it, and prepare the meals. The VAO also controls access to the residences in the supported living program. If the residence contains only one VAO client, and if the client or his guardian terminate the VAO's services, the client may remain in the residence pursuant to the terms of the lease or rental agreement. In these residences, the Habilitation employees may occupy a room in the residence to serve as an office and to house desks and file cabinets. The Habilitation employees who provide services in the supported living program also exercise control over the clients' daily activities.

Johnston, 213 F.3d at 562-63, Appendix at pp. 8a-9a. These "factual" conclusions are not supported by the record.

A. VOAO Does Not Typically Select a Residence for the Clients and Does Not Typically Set up Shared Living Arrangements.

The record demonstrated that the client or guardian selects the housing unless they are unable to do so or elect not to do so. Although VOAO employees may go out and look for a place for a client to rent, such would only be done *at the request of the client, the client's parent, or the client's guardian*. The record also demonstrated that the client or the client's family determines whether the client wants a roommate, and if so, the client or guardian chooses who the roommate will be. The Tenth Circuit's conclusion that

VOAO typically selects a residence and sets up shared living arrangements for the clients is not supported by the record.

B. Although There Are Some Instances Where Multiple Clients Reside in the Same Home, Such Is Not Necessarily the Typical Case.

The record demonstrated there are one, two, or three clients residing in each home where VOAO provides services. The Tenth Circuit's conclusion that the residences are "typically" occupied by multiple residents is unsupported by the record. At any rate, the decision to have a roommate is not the decision of VOAO, but rather, the decision of the client or the guardian.

C. VOAO Does Not Typically Sign the Lease and Pay the Rent.

The record demonstrated that the client's name usually appears on the lease. Although VOAO is *sometimes* listed along with the client on the lease depending on the client's physical and mental abilities and the guardian's willingness to sign the lease, such certainly is not the typical situation. The record also demonstrated that the clients' rent is paid with a combination of personal funds and state funds. Although VOAO may write the rent check for some clients, VOAO writes the check from its operating account and then is reimbursed by that client. Further, VOAO does not own any of the homes in which its services are provided. The Tenth Circuit's conclusion that VOAO typically signed the lease and paid the rent for the clients' residences was not supported by the record.

D. VOAO Employees Do Not Typically Manage the Residences and VOAO Does Not

Exercise Control over Clients' Daily Activities.

The Tenth Circuit observed as "fact" that VOAO employees typically manage the residences by "buy[ing] the food, control[ling] access to it, and prepar[ing] the meals." *Johnston*, 213 F.3d at 563, Appendix at p. 8a. The functions of buying the food and preparing the meals are activities designed to assist disabled individuals in daily living; they are not functions of managing the residences. It is unclear what the Tenth Circuit meant by "control[ling] access to [the food]" and there is no support for such conclusion in the record.[4]

The record demonstrated that VOAO's workers do take clients shopping and buy things clients need for their homes. It is the clients, however, who pay for those groceries. Also, such purchases are made at the direction of VOAO's clients and their guardians. For example, even VOAO's nonverbal clients, like Mr. George Bigelow, can communicate their choices. When VOAO's employee takes Mr. Bigelow shopping for clothes, Mr. Bigelow picks out everything he gets. Even Mr. Box, who is "deaf, blind, mute, in a wheelchair" could indicate his own preferences regarding food choices. Clients and guardians make food choices, not

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[4] Plaintiffs presented evidence that food cabinets and refrigerators were locked to keep certain clients from eating food. Such testimony related solely to patients diagnosed with Prader-Willi syndrome, an eating disorder regulated by the state. Patients with Prader-Willi syndrome were placed in group homes, not the homes at issue here. However, none of the Plaintiffs in this lawsuit claimed entitlement to overtime wages as a result of hours worked at a Prader-Willi group home.

VOAO employees. Some clients cook for and feed themselves. To the extent the clients' menus are planned, such planning is done by nutritionists employed by the Oklahoma Department of Human Services, not VOAO.

Some clients are capable of handling their own finances, while others need assistance. VOAO clients who can handle their own money do so, but VOAO workers provide help to clients who want or need help in managing their money. Each situation is dependent upon the clients' individual needs and capabilities.

The Tenth Circuit concluded that a family member cannot give "emotional support" or "manage and maintain" a home in the best interests of a disabled person unless that family member lives in the disabled person's home. *See Johnston*, 213 F.3d at 565, Appendix at p. 13a. The record demonstrated otherwise. For example, VOAO client Tereca Adams' mother, Lorna Adams, was very involved with all aspects of the services VOAO provided to her daughter. She actually interviewed VOAO staff and decided whether or not they could work with her daughter. At times, Mrs. Adams would insist that a VOAO employee be replaced if she decided she did not want that particular person to work with her daughter any more. Mrs. Adams also selected her daughter's roommate.

Mary and George McHargue are the parents and legal guardians of their son, Lonnie McHargue, a VOAO client. Mr. and Mrs. McHargue are actively involved in their son's life and keep a close eye on the services provided by VOAO. Lonnie McHargue has two roommates, Mr. Box and Mr. Richardson. Their parents are also their guardians. Mr. Richardson's mother, Shirley Richardson, regularly calls meetings with the VOAO staff to discuss her son's nutrition

and health needs. Additionally, the parents or guardians of VOAO clients select furniture for the clients' homes.

Although a House Manager is assigned to each residence, that House Manager's job duties are the same as the other VOAO employees, but include supervising other VOAO employees in the home, ensuring that doctor's appointments are scheduled and kept, and keeping track of medications used by clients. There is no evidence, however, that these House Managers set those schedules. If a parent or guardian wants to take a client out and about, they can do so whenever they want to. The client, to the extent possible, or guardian determines the daily activities of the clients. Further, the clients' jobs and health care providers also determine the client's daily activities, not VOAO employees. Some clients function at a high enough level that the client has "much more freedom in that he could leave his home and be gone for several hours, whether he was working or not, and without" a VOAO employee. The Tenth Circuit's conclusion that VOAO controls the residences, again, is not supported by the record.

E. VOAO Does Not Control Access to the Residences.

There was simply no evidence in the record to support the conclusion that VOAO controls access to the residences. VOAO can only imagine that this statement came from Plaintiffs' disputed contention that VOAO employees "control the doings" in the client's house. However, VOAO demonstrated by record citations that there is no evidence to support such contention. There was disputed evidence about whether VOAO employees "controlled" the keys at the residences. If the client or the parent or guardian wants the staff to have a key, that is their choice. Some of VOAO's

clients are physically unable to use or manage keys, and VOAO's staff therefore must use the keys to open the door for the client. Even so, such does not necessarily indicate that the employee would therefore control access to the residences. The evidence was, at a minimum, disputed, and therefore did not support summary judgment.

F. If VOAO's Services Are Terminated, the Client, Not VOAO, Remains in the Residence.

The evidentiary record indicated the client or the client's guardian can change providers from VOAO to another agency at any time. In the event of a change in providers, the client stays in his or her home. For example, when the guardian for VOAO clients Annie White and Glenda Wheat decided to terminate VOAO's services, Ms. White and Ms. Wheat stayed in their home and VOAO left. John Chappell, a former VOAO client, hired and fired staff of VOAO on a regular basis. He also ultimately fired VOAO. When Mr. Chappell fired VOAO, his leased property stayed with him, not with VOAO. The Tenth Circuit's conclusion that VOAO remains in the residence was not supported by the record.

G. VOAO's Employees Do Not "Occupy" a Room of the Residence to Serve as an Office Which Houses Desks and File Cabinets.

The record established that paperwork was kept in an out-of-the-way place in the clients' homes. If the paperwork was kept in a spare bedroom, that bedroom was not "closed off." Not all of the houses had spare bedrooms where records were kept. If no spare bedroom was available, the paperwork was kept somewhere else, such as a file cabinet in the kitchen,

or elsewhere.[5] Even when the paperwork was kept in a spare bedroom, the clients were not locked out of that room.

Plaintiffs cited deposition transcript testimony which disputes some of the evidence discussed herein. VOAO, however, demonstrated how such evidence was not competent either because it was based on hearsay, the witness lacked first hand knowledge, or Plaintiffs' brief misstated the record. The point is, however, that at a minimum, the record contains disputed evidence on these issues.

As the Tenth Circuit recognized, in reviewing a grant of summary judgment, the court must consider the evidence in the light most favorable to VOAO. *Johnston*, 213 F.3d at 562, Appendix at p. 7a. Considering the above, however, the Tenth Circuit failed to apply this standard. In fact, it appears the Tenth Circuit drew all inferences in favor of Plaintiffs. As the Tenth Circuit also recognized, in reviewing a grant of summary judgment, the court "must determine whether there was any genuine issue as to any material fact". *Johnston*, 213 F.3d at 562, Appendix at p. 7a (*citing Bennett v. Coors Brewing Co.*, 189 F.3d 1221, 1227 (10th Cir. 1999)). At a minimum, a large portion of the evidence upon which the Tenth Circuit relied was disputed. Although, as the Tenth Circuit observed, the FLSA's exemptions are to be narrowly construed, such construction should not mean that facts supporting VOAO's entitlement to an exemption can be disregarded or reviewed in the light most favorable to Plaintiffs.

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[5] The State of Oklahoma required VOAO to keep certain records and paperwork in the clients' homes.

Certiorari is appropriate to correct these substantial errors.

CONCLUSION

WHEREFORE, VOAO requests this Court to grant *certiorari* to address and clarify the proper interpretation of the companionship services exemption to the overtime wage requirements of the FLSA. This Court's review would resolve an intolerable conflict created by the Tenth Circuit's ruling in this case. Additionally, the Court's guidance on this issue of first impression, in light of the significant public policy issues presented, will have far-reaching implications for the ever-increasing number of Americans who require or will require companionship services. Finally, this Court should exercise its supervisory authority to correct the Tenth Circuit's significant departure from the accepted and usual course of judicial proceedings.

Respectfully submitted,

/s/_____

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed May 23, 2000]

No. 99-5132

DEBORAH JOHNSTON, individually and on behalf of others similarly situated; DIANA RUSS, individually and on behalf of all others similarly situated; BRIDGET A. AMES; RUSSELL APPLEGATE; LAJOYA A. BARNES; SHARON BATES; BETTY J. BAUCOM; HELEN BERRY; JIMMY BOSTIC; ALETA BRITT; ANGELINE C. BROOKS; SHAWNDA L. BROWN; DAWNA CAMPBELL; EDNA J. CRABTREE; PRISCILLA CRUME; SANDRA D. DEVILLE; TINA M. ENGLISH; LINDA HALL; PAT HARPER; ROSIE M. JONES; ALYSA L. KINNELL; THOMAS LAWRENCE, JR.; QUEEN E. LEWIS; MARIE A. MAXWELL; PATRICIA R. MCCARRELL; SEAN MCDANIEL; CHARLES W. MULANAX; LUGENA	)

NWAIWA; TERRELL T. PALMER; LOVERL RAMSEY; YOLANDA RAMSEY; TRACY RICHARD; TILEQUA L. SAVAGE; MIRIAM SERWANGA; PATRICIA L. STALEY; MICHELLE L. TYMA, TERI VAUGHT; TERESA VEALES; ERNEST WALSTON; JERILD A. WALSTON; KARLA WALSTON; SANDRA WILKINS; LAKEESA GIBBONS; RHONDA D. WHEELER; KELLY J. KAULAY; TRACY EMERSON; DARREN J. HANNAH, CHRISTI G. KING-WILLIAMS; PAMELA J. BERRY; MICHAEL W. GRAHAM; KIMBERLY JONES,

Plaintiffs - Appellees,

v.

VOLUNTEERS OF AMERICA, INC.

Defendant - Appellant.

STATE OF OKLAHOMA, DEPARTMENT OF HUMAN SERVICES,

Amicus Curiae.

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 96-CV-1166-K)

JoAnne Deaton (Michael F. Smith of Rhodes, Hieronymus, Jones, Tucker & Gable, P.L.L.C., Tulsa, Oklahoma; Richard Gann of Riggs Abney Neal Turpen Orbison & Lewis, Tulsa, Oklahoma with her on the brief), for Defendant-Appellant.

Steven R. Hickman of Frasier, Frasier & Hickman, Tulsa, Oklahoma, for Plaintiffs-Appellees.

Mark Lawton Jones, Assistant Attorney General, State of Oklahoma, Department of Human Services, Oklahoma City, Oklahoma, filed a brief for Amicus Curiae.

Before **BALDOCK**, **McKAY**, and **ALARCÓN**,* Circuit Judges.

ALARCÓN, Circuit Judge.

Volunteers of America Oklahoma, Inc. ("the VAO") appeals from the order denying its motion for summary judgment seeking dismissal of the claims brought against it by its employees who work as Habilitation Training Specialists and Habilitation Training Specialist Managers ("Habilitation employees") in residences in the VAO's supported living program. The Habilitation employees filed a claim against the VAO seeking payment for working overtime. The VAO contends that it is exempt from paying not less than one and one-half times the hourly rate for work performed in excess of 40 hours a week to the Habilitation employees in the supported living program, pursuant to the domestic services

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* The Honorable Arthur L. Alarcón, Senior United States Circuit Judge for the Ninth Circuit, sitting by designation.

exemption to the Fair Labor Standards Act, 292 U.S.C. § 213(a)(15). The district court denied the VAO's motion for summary judgment. It concluded that the domestic services exemption does not apply to Habilitation workers assigned to the supported living program because their services are not performed in private homes. Following the denial of the VAO's motion for summary judgment, the parties stipulated to the amount of overtime wages, costs, and attorneys' fees to which the Habilitation employees would be entitled if the exemption did not apply. Thereupon, the district court entered its final judgment. We have jurisdiction pursuant to 28 U.S.C § 1291. Because we conclude that the record shows that the Habilitation employees were not employed in private homes, we affirm the denial of the VAO's motion for summary judgment.

I

The Fair Labor Standards Act ("FLSA") requires employers to pay their employees not less than one and one-half times the hourly rate for all hours worked over forty in a workweek. See 29 U.S.C. § 207(a)(1).[1] The FLSA

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[1] Section 207(a)(1) provides as follows:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than

exempts employers from the maximum hour requirements for "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. § 213(a)(15). The regulations define domestic service employment as "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." 29 C.F.R. § 552.3.

We must decide whether the Habilitation employees in the supported living program perform services in or about the private home of a developmentally disabled person "by whom he or she is employed." The Habilitation employees contend that they are entitled to overtime pay because they are employees of the VAO and not the employees of the individuals who are unable to care for themselves. They argue that 29 C.F.R. § 552.3 limits the exemption to services performed in the private home of the individual who employs a Habilitation employee. The Secretary of Labor's regulations clearly provide, however, that domestic service employees "who are employed by an employer other than the family or household using their services" may also be exempt from the FLSA. 29 C.F.R. § 552.109(a). The Habilitation employees assert that "any reliance upon 29 C.F.R.

> forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

§ 552.109, an interpretation which does not have the effect of law, is misplaced."

We quite agree that we are not bound by an agency's interpretation of a statute that is unreasonable. In § 213(a)(15), Congress expressly left it to the Secretary of Labor to define and delimit the terms in the statute by regulation. The Supreme Court has instructed that courts must defer to a federal agency's interpretation of a statute unless the regulation is "arbitrary, capricious, or manifestly contrary to the statute." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984). The contention that the exception does not apply to domestic services employees who are not employed directly by an individual in need of care, or his or her family has been rejected by the courts that have been confronted with the same question. See Terwilliger v. Home of Hope, Inc., 21 F. Supp. 2d 1294, 1299 n.2 (N.D. Okla. 1998) (rejecting, as inconsistent with 29 C.F.R. § 552.109(a), the plaintiffs' argument that the private home exception did not apply because they were employed by the agency and not the individual clients); Madison v. Resources for Human Development, Inc., 39 F. Supp. 2d 542, 545 n.3 (E.D. Pa. 1999) (holding that pursuant to 29 C.F.R. § 552.109, "[a]lthough the plaintiffs are employed by RHD rather than the individuals they serve, that by itself does not exclude them from the exemption."). We are persuaded that the secretary's interpretation is not arbitrary, capricious, or manifestly contrary to § 213(a)(15). We hold that the fact that domestic service employees are not employed by the individual receiving care, does not alone exclude them from the exemption.

II

The VAO contends that the plaintiffs are not entitled to overtime payments because the Habilitation employees perform domestic/companionship services in the private homes of its clients in the supported living program.[2] We review the denial of a motion for summary judgment de novo. See Bennett v. Coors Brewing Co., 189 F.3d 1221, 1227 (10th Cir. 1999). We must determine whether there was any genuine issue as to any material fact, and, if not, whether the district court correctly applied the law to the facts construed in the light most favorable to the party opposing summary judgment. See id.

We must construe the domestic services exemption narrowly, "in light of the FLSA's broad remedial aims." Ackerman v. Coca-Cola Enters., Inc., 179 F.3d 1260, 1264 (10th Cir. 1999). The VAO bears the burden of proving that its employees fit "plainly and unmistakenly within the [exemption's] terms." Id. (internal quotations and citations omitted). In construing the exemption narrowly we are required to give deference to the regulations promulgated by the Department of Labor. See id.

The VAO provides assisted living domestic services to developmentally disabled persons through two different programs. In the in-home program, the VAO's Habilitation employees perform services in the family home where the

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[2] The parties do not dispute the fact that the Habilitation employers in the supported living program perform domestic/companionship services.

developmentally disabled person resides with his or her parents or other family member. The family member in the in-home program makes all the household management decisions such as the purchase of groceries, the arrangement of furniture, and the payment of rent and utilities. The VAO does not occupy rooms in the clients' family home for use as an office. If the VAO's services are terminated, the client remains in the family home.

In the supported living program, the client does not reside with a family member. The VAO typically selects a residence for the developmentally disabled person, and sets up shared living arrangements with other developmentally disabled persons. Up to three clients reside in the residences in the VAO supported living program. The VAO signs the lease, and typically pays the rent from the clients' trust accounts. In the supported living program, only the clients of the VAO may live together. The VAO usually selects the clients who will share the same residence, although the client has the right to request a change of roommate. If one of the clients terminates the VAO's services and chooses a different service provider than his roommate, one of them must leave the residence.

The Habilitation employees manage the residences in the supported living program. They buy the food, control access to it, and prepare the meals. The VAO also controls access to the residences in the supported living program. If the residence contains only one VAO client, and if the client or his guardian terminate the VAO's services, the client may remain in the residence pursuant to the terms of the lease or rental agreement. In these residences, the Habilitation employees may occupy a room in the residence to serve as an

office and to house desks and file cabinets. The Habilitation employees who provide services in the supported living program also exercise control over their clients' daily activities.

III

No circuit court has interpreted the meaning of the term "private home" as used in 29 C.F.R. § 552.3. Several district courts, however, have addressed this question. In Lott v. Rigby, 746 F. Supp. 1084 (N.D. Ga. 1990), the court ruled that the plaintiffs, who were employed as house parents at the Stephens County Independent Group Residence for the Mentally Retarded, were not employed in a private home. Id. at 1085, 1088. The court relied on a 1975 administrative opinion which stated that the exemption would not apply to employees providing care to institutionalized persons, even if the services were provided in a residential home setting. See id. at 1087 (citing Wage and Hour Opinion WH-368, 91 W.H.M. 1031 (Nov. 25, 1975)). The court also noted that a private home is a fixed abode of the individual or family and that it is a separate and distinct dwelling maintained by the individual or family. See id. (citing H.R. Rep. No. 913, 93rd Cong., 2nd Sess., reprinted in, 1974 U.S. Code Cong. & Admin. News 2811, 2845). The court concluded that the fact that the home was the clients' sole residence was not enough to make it a private home. See id. The court also determined that although the clients participated in the upkeep of the house as part of their learning process, they certainly did not maintain the home. See id.

The next court to reach this issue ruled that the exemption did not apply to plaintiffs who were Habilitation

Training Specialists. See Linn v. Developmental Servs. of Tulsa, Inc., 891 F. Supp. 574, 580 (N.D. Okla. 1995). The court focused on the fact that the defendant acquired the residences and the furniture for the clients and maintained a set of keys to the residences. See id. at 579. The court noted that the clients who lived together were unrelated and were grouped together for purposes of training and treatment, and that the defendant retained substantial authority in determining the composition of the homes. See id. The district court also relied on the fact that the clients did not pay the rent to the landlords, but rather, the state paid the defendants who in turn paid the landlords. See id. Like the court in Lott, the court in Linn found that although the clients participated in the upkeep of the home, the service provider was ultimately responsible for its maintenance. See id. The court concluded that the defendant was in the business of providing both companionship and lodging to its clients and that the residences were not private homes as contemplated by the legislative history because they were more like lodging houses that act as business enterprises. See id.; see also H.R. Rep. No. 913, 93rd Cong., 2nd Sess. 1974 ("[A] dwelling house used primarily as a boarding or lodging house for the purpose of supplying such services to the public, as a business enterprise, is not a private home.").

In Terwilliger v. Home of Hope, Inc., 21 F. Supp. 2d 1294 (N.D. Okla. 1998), a district court from the same district distinguished the facts set forth in Linn. The district court concluded in Terwilliger that, based on the facts in the record before it, the Habilitation training specialists provided domestic/companionship services in private homes. The district court found that the defendant did not acquire the residence or the furniture for the clients. See id. Instead,

22% of the homes were owned by the clients' parent or guardian and the rest were leased in the clients' names from third parties. See id. The defendants did not co-sign the lease and the clients selected and purchased their own furniture. See id. The court also found that, unlike Linn, the defendants only kept keys to the residences for emergencies or to use with the clients' express permission. See id. The court also relied on the fact that the clients, not the defendant, chose whether or not to have a housemate and who the housemate would be. See id. The court noted that ten of the twenty seven homes were occupied by a single client. See id.

Most recently, in Madison v. Resources for Human Development, Inc., 39 F. Supp. 2nd 542 (E.D. Pa. 1999), the district court ruled that the residence in which the plaintiffs worked were not private homes. Id. at 548. In reaching its decision, the court considered the decisions in Lott, Linn, and Terwilliger, as well as a case from the Utah Supreme Court, Bowler v. Deseret Village Ass'n, Inc., 922 P.2d 8 (Utah 1996). See id. at 545-46. The court acknowledged that, in light of these decisions, it is clear that the inquiry into whether services are provided in a private home for purposes of the domestic services's exemption is "fact-specific and to be made on a case-by-case basis, and that no one factor is dispositive." Id. at 546.

After evaluating all of the facts, the court in Madison concluded that the defendant ran the residences "as part of an overall care program" and that the clients lived there "as clients of the program." Id. at 548. The court acknowledged the fact that the clients were given the opportunity to make choices for themselves, but found that ultimately the service provider was in charge of the residence. See id. In reaching

its conclusion, the district court was persuaded by the fact that the service provider placed its clients in one of its existing locations, or limited and supervised the clients' choice of residence. See id. The district court pointed out that the clients paid room and board fees to the defendant who rented the houses and paid the expenses. See id. The district court also noted that some of the residents did not have keys to the residences and were not allowed to come and go as they pleased. See id. The court also relied on the fact that the maintenance of the homes and the clients' activities in them were regulated by state law and the service provider's rules. See id. Finally, the court found significant the fact that the clients did not live in the homes before they became clients of the service provider. See id.

The Ninth Circuit considered the application of the domestic/companionship services's exemption in McCune v. Oregon Senior Servs. Div., 894 F.2d 1107 (9th Cir. 1990). It did not, however, discuss the meaning of the words "private home." In McCune, the plaintiffs were full-time, live-in attendants for elderly and disabled persons unable to care for themselves. Id. at 1108. The Ninth Circuit affirmed the district court's holding that the live-in attendants came within the companionship exemption to the FLSA. The plaintiffs in McCune did not seek overtime pay. Id. at 1111. The Ninth Circuit noted that the plaintiffs "live with their clients at a near poverty level providing around-the-clock care." Id. at 1110. The Ninth Circuit rejected the argument of the full-time, live-in attendants that they should be entitled to the minimum wage provisions of the FLSA because "individuals providing services to the elderly and infirm have a much less attractive job than those domestic service workers providing service to other clients." Id. at 1109. The court

noted that if full-time, live-in attendants received minimum wage, the elderly and infirm would "be forced to forego the option of receiving these services in their homes if the cost of the services increases." Id. at 1110. This policy concern has no application in this matter. The Habilitation employees who provide services in the supported living program do not live with their clients or provide around-the-clock care.

We agree with the district court in Madison that a determination whether domestic/companionship services are provided in a private home is "fact-specific and to be made on a case-by-case basis, and that no factor is dispositive." 39 F. Supp. 2d at 546. After reviewing the evidence in the light most favorable to the VAO, we conclude that it has failed to meet its burden of demonstrating that Habilitation employees in the supported living program fit "plainly and unmistakenly" within the overtime exemption for domestic service in private homes because of our duty to construe narrowly § 218(a)(15). See Ackerman v. Coca-Cola Enters., Inc., 179 F.3d at 1264. The domestic/companionship services performed by the Habilitation employees in the in-home program fit squarely within the exemption. Just as the name of the program implies, the services are performed in the family home of the developmentally disabled client. A family member is present to give the client emotional support and to manage and maintain the home in his or her best interests. The VAO's clients in the supported living program are placed in a residence outside the family home and without the full-time, live-in care of a relative. Instead, they are housed in a residence with strangers who are also developmentally disabled. Their diets and daily activities are controlled by a Habilitation employee – not a family member. While the lease to the residence may be co-signed by a client,

the VAO has the right to appropriate a room to use as an office for the Habilitation workers. These residences, managed by VAO employees, do not fit plainly and unmistakenly into the ordinary connotation of the words "private home" as used in 29 C.F.R. § 552.3, notwithstanding the fact that the lease may bear the name of a developmentally disabled person. The district court did not err in denying the VAO's motion for summary judgment.

V

The VAO and the State of Oklahoma Department of Human Services urge us to consider the history and the state policy interest behind the living arrangements in its supported living program in evaluating whether these services are provided in private homes. As a result of a class action law suit, the District Court of the Northern District of Oklahoma entered an Order of Deinstitutionalization, shutting down a state-run institution for developmentally disabled individuals because it was found that the residents were neglected and abused. See Homeward Bound, Inc. v. Hissom Mem'l Ctr., No. 85-C-437-E, 1987 WL 27104 (N.D. Okla. 1987). While the judgment implementing the court's order was on appeal the parties settled and proposed a consent decree that was approved by the court. The consent decree stated:

> A person's place of residence is his/her home. The State shall advocate that he/she may not be arbitrarily removed from the home for reasons relating to his/her mental retardation, behavior or medical condition. . . . Adults shall live with people of their choice. Whenever possible, the building in which adults live shall

> either be purchased or rented by the persons residing in it.

Pursuant to the consent decree, organizations such as the VAO enter into a contract with the Oklahoma Department of Human Services where they agree to provide services to the clients in exchange for reimbursement for approved services on a fee-for-service hourly fixed rate. The service providers are required to "document reasonable efforts to ensure consumers served through this Contract are afforded freedom of choice in all aspects of service provision, for which the Agency is responsible, unless such choice jeopardizes the consumers independence and well-being."

The policy considerations articulated here are important and ensure that persons with developmental disabilities are treated with dignity and are given the opportunity to integrate into mainstream society and to exercise freedom of choice. The commendable policies reflected in the consent decree have no bearing on the question whether the Habilitation employees who perform services in a supported living program are entitled to overtime pay because they work in residences managed by service providers. Whether or not the VAO's employees receive overtime wages does not change the fact that these residences likely meet the goals of the consent decree and provide persons with developmental disabilities a much more free and dignified existence than if they remained in a large, state-run institution.

The Department of Human Services contends that whether the VAO's employees receive overtime wages does make a difference as to the kind of care its clients may

receive. The Department asserts that the absence of overtime wage obligations ensures that the state is able adequately to reimburse service providers such as the VAO for the care of its clients. The Department argues that if the exemption does not apply, the availability of these important services would be limited because the services would cost more to provide.

Our task is limited to determining whether the Secretary of Labor's limitation of the exemption to domestic/companionship services provided in the private home of a disabled person is arbitrary, capricious or manifestly contrary to the FLSA. We conclude that the Secretary of Labor's interpretation of the reach of the exemption is reasonable. We lack the authority to broaden the coverage of the exemption to residences that are maintained by a service provider. The fact that the requirement that overtime pay should be paid to domestic services providers in residences like those managed by the VAO may limit the availability of such services should be addressed to Congress. We decline to broaden the exemption to apply to residences that are not truly private homes.

VI

We AFFIRM the district court's decision because we hold that the services provided by the Habilitation employees in the supported living program are not provided in the private homes of the developmentally disabled.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed June 4, 1999]

No. 96-CV-1166-K
(Consolidated with
97-CV740 K)

DEBORAH JOHNSTON and	)
DIANA RUSS, individually and	)
on behalf of all others similarly situated,	)
Plaintiffs,	)
	)
vs.	)
	)
VOLUNTEERS OF AMERICA	)
OKLAHOMA, INC.,	)
Defendant.	)
	)

JUDGMENT

This matter arising under the Fair Labor Standards Act came before the Court for consideration upon Defendant's Motion for Summary Judgment. After having duly considered the issues raised and deciding them in an Order filed on April 9, 1999, and after having been advised of the parties' stipulation as to the amount of damages, costs and

attorneys' fees, the Court has determined that Plaintiffs are entitled to judgment in their favor.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the remaining fifty Plaintiffs, inclusive of damages, costs and attorneys' fees, as follows:

Name	Amount
Deborah Johnston	$8,396.63
Diana Russ	$8,293.43
Bridget A. Ames	$2,369.02
Russell Applegate (dec.) Norman L. Applegate	$9,811.34
Sharon Bates	$1,743.03
Betty J. Baucom	$178.70
Helen Berry	$6,813.80
Pamela Brown Berry	$1,431.38
Jimmy Bostic	$4,781.99
Aleta Britt	$7,385.41
Angeline C. Brooks	$1,122.16

Shawnda L. Brown	$4,857.05
Dawna Campbell	$4,918.80
Jonathan Coleman	$178.70
Edna J. Crabtree	$570.94
Priscilla Crume	$3,553.38
Sandra D. Deville	$3,100.95
Tracy Emerson	$1,329.52
Tina M. English	$178.70
Lakeesha Gibbons	$1,471.59
Linda Hall	$1,254.47
Darren J. Hannah	$373.93
Pat Harper	$3,368.03
Kimberly Jones	$1,283.06
Rosie M. Jones	$602.04
Kelly J. Kaulay	$488.44
Christi G. King	$6,938.45
Alysa L. Kinnell	$178.70

Thomas Lawrence, Jr.	$394.03
Queen E. Lewis	$981.95
Marie A. Maxwell	$178.70
Patricia R. McCarrell	$4,712.30
Sean McDaniel	$4,964.27
Charles W. Mulanax	$1,275.91
Lugena Nwaiwa	$2,469.73
Terrell T. Palmer	$6,189.25
Sandra K. Peterson	$323.00
Loverl Ramsey	$896.36
Yolanda Ramsey	$3,045.04
Tracy Richard	$662.08
Tilequa L. Savage	$402.07
Miriam Serwanga	$584.35
Patricia L. Staley	$4,034.48
Teri Vaught	$3,266.80
Teresa Veales	$4,303.78

Ernest Walston	$1,927.27
Jerild A. Walston	$3,366.69
Karla Waltson	$1,600.02
Rhonda A. Wheeler	$5,386.98
Sandra Wilkins	$2,061.30
Total	$140,000.00

with interest thereon at the rate of 4.879%, as provided by law.

IT IS SO ORDERED this 28th day of May, 1999.

/s/_____
Terry C. Kern
TERRY C. KERN
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed April 9, 1999]

No. 96-CV-1166-K

DEBORAH JOHNSTON and)
DIANA RUSS, individually and)
on behalf of all others similarly situated,)
Plaintiffs,)
)
vs.)
)
VOLUNTEERS OF AMERICA)
OKLAHOMA, INC.,)
Defendant.)
)

ORDER

Now before the Court is the Motion of Defendant, Volunteers of America Oklahoma, Inc. ("VOAO"), for summary judgment against the allegation by Plaintiffs that Defendant failed to pay overtime compensation as required by the Fair Labor Standards Act of 1938, as amended (hereinafter "FLSA"), 29 U.S.C. § 201 et seq. The Defendant argues there is no genuine issue of material fact at

issue, and VOAO is entitled to summary judgment pursuant to FED. R. CIV. P. 56 as a matter of law.

I. Statement of the Case

This case involves claims for overtime wages pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et. seq.* VOAO is a nonprofit agency which, as one of its services, provides companionship services to developmentally disabled individuals. The Plaintiffs, current and former employees of VOAO, provided these services to VOAO's clients in residential settings. Plaintiffs claim entitlements to overtime pay for hours worked in excess of 40 hours per week.

VOAO renders services for 320 clients with developmental disabilities. VOAO provides both supported living and in-home services to these clients. The services in supported living are provided in the client/consumer's private home, while the services in the in-home program are provided to the client in his or her parents' home. The Plaintiffs involved in this lawsuit were employed in VOAO's supported living program either as Habilitation Training Specialists (HTS) or Habilitation Training Specialist Managers (House Managers) during the relevant period of time. Based on the companionship exemption found at 29 U.S.C. §213(a)(15), Plaintiffs and other HTS workers and HTS managers employed by VOAO were paid straight time rather than time-and-a-half for hours worked over forty per week, from July of 1994 forward.

II. Summary Judgment Standard:

Defendant submits that it is entitled to summary judgment on the grounds that Plaintiffs' employment as companions exempts them from overtime pay under the FLSA, 29 U.S.C. §213(a)(15).

Summary judgment pursuant to FED. R. CIV. P. 56 is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986), cert den. 480 U.S. 947 (1987). In Celotex, 477 U.S. at 322 (1986), it is stated:

> "[T]he plan language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. In Anderson v. Liberty Lobby, Inc., the Court stated:

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

477 U.S. at 252. The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

III. Discussion of "Companionship Exemption"

The question for the Court is whether the Defendant's employees provide "companionship services," thus fitting under the companionship exemption to the FLSA carved out under 29 U.S.C. § 213(a)(15). Congress created the companionship services exemption to enable guardians of the elderly and disabled to afford to have their wards cared for in their own private homes as opposed to institutionalizing them. Lott v. Rigby, 746 F. Supp. 1084, 1087 (N.D. Ga. 1990). Under the relevant provision, an exemption from overtime compensation is granted to:

> "any employee employed on a casual basis in domestic service employment to provide babysitting services *or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by the regulations of the Secretary)*.

29 U.S.C. § 213(15) (emphasis added).

An employer who asserts it is exempt from the Act maintains the burden of establishing "affirmatively and clearly" that the exemption applies. Lamon v. City of Shawnee, 972 F.2d 1145, 1153 (10th Cir. 1992), cert den., 113 S.Ct. 1414 (1993). Moreover, exceptions to the FLSA must be narrowly construed. A. H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945). As the Tenth Circuit has stated:

> An employer who asserts he is exempt from the Act has the burden of "establishing the exemption affirmatively and clearly." Exemptions must be narrowly construed and are limited to those establishments *plainly and unmistakenly within the terms and the spirit of the exemption invoked.*

Schoenhals v. Cockrum, 647 F.2d 1080, 1081 (10th Cir. 1981) (emphasis added).

In this case, the Court must determine whether the services provided by the Defendant are encompassed in the exemption as it relates to companionship services. This Court contemplated the identical issue in Linn v. Developmental Services of Tulsa, Inc., 891 F. Supp. 574 (N.D.Okl. 1995). In Linn, as in this case, the Defendant argued that its employees provided "companionship services", thus fitting under the companionship exemption to the FLSA carved out under 29 U.S.C. § 213(a)(15). In deciding the case, this Court reviewed the regulations from the Secretary for guidance in determining the scope of the companionship exemption, further defining the terms "companionship" and

"domestic service employment" as used in 29 U.S.C. § 213(15).

According to the regulations, companionship is defined in the following manner.

> [T]he term companionship services shall mean those services which provide fellowship, care, and protection for a person, who, because of advanced age or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the . . . infirm person such as meal preparation, bed making, washing of clothes, and other similar services.

29 C.F.R. § 552.6.

The regulations also contain two exceptions for the companionship services exemption: (1) general household services exceeding twenty percent of the total weekly hours worked; and (2) services performed by trained personnel, "such as a registered nurse or practical nurse." 29 C.F.R. 552.6; Toth v. Green River Regional Mental Health Board, Inc., 753 F. Supp. 216, 217 (W.D.Ky. 1989), aff'd 985 F.2d 560 (6th Cir. 1993). When these exceptions apply, the exemption for companionship services cannot be used, and the general FLSA overtime rules govern. The Plaintiffs do not raise either of these exceptions to the general exemption in an argument to withstand summary judgment; there, they will not be addressed here.

Plaintiffs herein focus their argument around the claim that they were not employed in the "private homes" of clients, but rather, were employed in "business establishments." In defining "domestic service employment", 29 C.F.R. § 552.3 states in pertinent part:

> [T]he term "domestic service employment" refers to services of a household nature performed by an employee *in or about a private home* (permanent or temporary) of the person by whom he or she is employed. (Emphasis added).

According to the legislative history, a private home is understood to be a fixed abode of the individual or family that is maintained by the individual or family in an apartment, house, or hotel. H.R.Rep. No. 913, 93rd Cong., 2d Sess., as quoted in Lott v. Rigby, 746 F. Supp. 1084, 1087 (N.D.Ga. 1990). The House Report language states:

> The domestic service must be performed in a private home which is a fixed place of abode of the individual or family. A separate and distinct dwelling maintained by the individual or family in an apartment house or hotel may constitute a private home. However, a dwelling house used primarily as a boarding or lodging house for the purpose of supplying such services to the public, as a business enterprise, is not a private home.

H.R.Rep. 913, 93rd Cong., 2nd Sess., 1974 WL 11448 at p. 74.

In Linn, this Court held that the Plaintiff successfully demonstrated that the Defendant was not entitled to the "companionship exemption," because the Plaintiff did not work in the private homes of Defendant's clients. In coming to this decision, the Court posited:

> Many factors distinguish the homes leased by these clients from the private homes contemplated by the statute. Defendant acquires the residences for the clients as well as the furniture for the residences. Defendant maintains a set of keys to the residences. Defendant makes decisions as to the number of people who live in the homes, often placing two or three people together in a residence. The Defendant retains substantial authority in determining the composition of homes. The clients who reside together are unrelated and are grouped together for purposes of treatment and training. Although the clients are signatories on the leases, the Defendant also signs the leases in many situations. The clients do not pay the rent to the landlord. Instead, almost all of the money is paid directly by the state to the Defendant. In turn, those sums are paid to the landlord.

Linn at 579. This Court went on to point out that the language of the House Report states that the dwelling space should be maintained by the inhabitants in order to be a private home. But, this Court found in Linn: "the **Defendant** [was] ultimately responsible for maintenance of the residence." Id. (Emphasis added).

VOAO attempts to distinguish this case from Linn by drawing the Court's attention to the relatively large degree of discretion the clients and the families have in choices affecting their day to day life decisions. For example, VOAO contends that, when a client is capable, they are allowed to do their own shopping, decide if they want a roommate, pick their roommates, appear on the lease of the home, possess keys to the home and manage their money.[1] When the client does not have the ability to make these decisions, they are largely left to the guardian of the client. For example, all of the homes that VOAO's clients live in are owned or leased by the clients, but "VOAO is sometimes listed along with the client on the leases if the physical and mental ability of the client is such that the client cannot read or comprehend the lease, and if the client's guardian refused to sign the lease."[2] VOAO contends that the client and/or the client's family decides if the client will have a roommate and, if so, the client or guardian chooses who the roommate will be. VOAO only maintains a set of keys to the client's homes if the client or the client's guardian desires VOAO to have a key. VOAO contends they only pay bills for rent, food, utilities, etc. directly when the client is not capable of handling their own money.

While recognizing the distinction the Defendant attempts to make between this case and Linn, Plaintiffs have nevertheless drawn this Court's attention to several striking

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[1] *Defendant's Brief In Support of Summary Judgment* at 7-9.

[2] Id. at 7.

similarities between the two situations. For example, Plaintiffs assert that the VOAO does, in fact, secure the clients' housing as well as their furniture, maintains keys to the residences, decides the composition of the homes, and signs many of the leases. Furthermore, Plaintiffs argue that many of the homes have fewer clients residing in them than there are bedrooms. The extra bedrooms are sometimes used as offices for VOAO personnel "wherein they keep their time sheets, policies and procedure manuals, and other documents . . ." Additionally, some of the homes maintain separate bathrooms for clients and staff.[3]

This Court made it clear in Linn that "legislative intent indicates that lodging houses that act as business enterprises should not be construed as private homes." Linn at 579. Such is the situation at hand. The fact that the clients are signatories on the leases does not obviate the clear indication that these are not "private homes" as contemplated by the statute. Id. In light of all relevant factors, the Court finds that the residences in this case, like those contemplated in Linn, "are more closely analogous to state-maintained facilities than to private homes." Id.

In conclusion, this Court finds that the companionship exemption is not applicable in the case at bar. This determination is consistent with the Tenth Circuit's holding in Schoenhals that exemptions to the FLSA should be narrowly construed and fit unmistakenly within the *terms and spirit* of the exemption invoked. Therefore, this Court finds that the

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[3] *Plaintiffs' Brief in Opposition* at 11.

residences maintained by the Defendant are not private homes for the purposes of applying the exemption. See Linn at 580.

IV. Conclusion

For the above stated reasons, the Court finds that the Defendant's Motion for Summary Judgment (#39) is DENIED, and holds that the FLSA's overtime provisions are applicable in this action.

ORDERED this 9th day of April, 1999.

/s/_____
Terry C. Kern
TERRY C. KERN, Chief
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed July 18, 2000]

No. 99-5132

DEBORAH JOHNSTON, et al.,
Plaintiffs - Appellees,

v.

VOLUNTEERS OF AMERICA OKLAHOMA, INC.,
Defendant - Appellant

DEPARTMENT OF HUMAN SERVICES,
Amicus Curiae

ORDER

Before **Baldock**, **McKay**, and **Alarcón**,* Circuit Judges.
Appellant's petition for rehearing is denied.

* The Honorable Arthur L. Alarcón, Senior United States Circuit Judge for the Ninth Circuit, sitting by designation.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by FED. R. APP. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/_____
PATRICK FISHER,
Clerk of the Court
Deputy Clerk

APPENDIX E

29 U.S.C. § 213(a)(15)

§ 213. Exemptions

(a) Minimum wage and maximum hour requirements

The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to--

* * *

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary);

29 C.F.R. § 552.3

§ 552.3 Domestic service employment.

As used in section 13(a)(15) of the Act, the term "domestic service employment" refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers,

governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

29 C.F.R. § 552.6

§ 552.6 Companionship services for the aged or infirm.

As used in section 13(a)(15) of the Act, the term "companionship services" shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: Provided, however, That such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked. The term "companionship services" does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.